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EDO Trading, Inc., and Lena Amerkhanian

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

TOYRIFIC, LLC,

Plaintiff,

v.

EDVIN KARAPETIAN, an
individual, EDWARD MINASYAN,
an individual, LENA
AMERKHANIAN, an individual, and
EDO TRADING, INC., a California
corporation,

Defendants.

) Case No. 2:12-cv-04499 ODW (Ex)
) Judge: The Honorable Otis D. Wright

) **DEFENDANTS' OPPOSITION TO**
) **PLAINTIFF'S MOTION TO**
) **VACATE THE COURT'S ORDER**
) **GRANTING DEFENDANTS'**
) **REVISED MOTION FOR SUMMARY**
) **JUDGMENT**

) Hearing Date: September 12, 2016

) Time: 1:30 p.m.

) Courtroom: 11

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO VACATE THE COURT'S
ORDER GRANTING DEFENDANTS' REVISED MOTION FOR SUMMARY JUDGMENT**

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 Counsel for Defendants Edvin Karapetian and Edward Minasyan
3 (“Defendants”) respectfully submit this Opposition to Plaintiff Toyriffic, LLC’s
4 (“Plaintiff”) Motion to Vacate the Order Granting Defendant’s Revised Motion for
5 Summary Judgment (“Motion”). This Opposition is based upon the herein
6 Memorandum of Points and Authorities, Exhibits and Declarations hereto as well as
7 the pleadings on file and any oral or written evidence that may be presented at the
8 hearing on the Motion.

9
10 DATED: August 22, 2016

Respectfully submitted,

11 COTMAN IP LAW GROUP, PLC

12 s/Rasheed M. McWilliams

13 By: _____

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18 *Attorneys for Defendants*

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20 *and Lena Amerkhanian*

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court should deny Plaintiff's motion to vacate the order granting defendant's motion for summary judgment because Plaintiff's reason for the delay is contradictory and lacks merit and Plaintiff has not provided evidence of good faith in missing deadlines set by the Court and the Local Rules of this Court.

II. PROCEDURAL HISTORY

Plaintiff Toyriffic, LLC ("Plaintiff") filed this current action on May 23, 2012 alleging that Defendants Edvin Karapetian and Edward Minasyan ("Defendants") violated the terms of a Settlement Agreement that stems from a previous action filed in August of 2010. Dkt. No. 1. On August 16, 2012, the Court dismissed all claims alleged by Plaintiff in its complaint, keeping only the claim for breach of contract. Dkt. No. 30. On March 25, 2013, Defendants filed their Motion for Summary Judgment on Plaintiff's remaining claim. Dkt. No. 50. On April 16, 2013, the Court issued an Order Granting Defendants' Motion for Summary Judgment. Dkt. No. 71. Plaintiff filed its appeal against the judgment on May 13, 2015 and The Ninth Circuit ultimately reversed and remanded the case back the Court on June 30, 2015 ordering the Clerk to re-open the case. Dkt. Nos. 77 and 89.

On September 3, 2015, Defendants filed their Motion for leave to file a motion for reconsideration. Dkt. No. 96. The Court denied Defendants Motion on December 17, 2015 and ordered Defendants to file a revised Motion for Summary Judgment on only the issues that the Ninth Circuit has instructed this Court to consider on remand and set the hearing on the matter for no later than March 21, 2016. Dkt. No. 102. On February 22, 2016, Defendants filed their Revised Motion for Summary Judgment addressing only the issues allowed by the Ninth Circuit and set a hearing date for March 21, 2016 per the Court's Order. Dkt. No. 103.

On March 2, 2016, Plaintiff filed its Opposition to Defendants' Revised motion for summary judgment and its Statement of Genuine Disputes on March 3, 2016, two and three days past the deadline to file an opposition to the motion required by the Local Rules, without any supporting Declarations or other evidence. Dkt. Nos. 105 and 106; Declaration of Rasheed McWilliams ("McWilliams Decl.") ¶2. On March 7, 2016 Defendants filed their timely Reply in support of their Revised Motion for Summary Judgment. Dkt. No. 107. On March 8, 2016, after the Defendants' Reply pointing out the missed Opposition deadline, Plaintiff filed the Declaration of Samuel Lockhart with an excuse for the missed deadline. Dkt. No. 109; McWilliams Decl., ¶3. On March 9, 2016, after Defendants' Reply pointed out the lack of supporting evidence in the form of documents or declarations, Plaintiff filed the Declaration of Kevork Kouyoumjian. Dkt. No. 110. Defendants filed their Objections to and Request to Strike Plaintiff's untimely opposition and declaration on March 11, 2016. Dkt. Nos. 107 and 111. On March 20, 2016 the Court issued an Order Granting Defendants' Revised Motion for Summary Judgment. Dkt. No. 113.

III. ARGUMENT

FRCP 60(b)(1) provides that "on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect." The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") has held that a determination of whether neglect is excusable requires an equitable analysis under the *Pioneer-Briones* factors, "(1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." *Lemoge v. United States*, 587 F.3d 1188, 1192 (9th Cir. 2009) (quoting *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223 (9th Cir. 2000)); see also *Pioneer Inv. Servs. Co. v.*

1 *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d
 2 74(1993); *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381-82 (9th Cir. 1997)
 3 (per curiam). Nevertheless, these factors do not constitute "an exclusive list."
 4 *Briones*, 116 F.3d at 381; *Bateman*, 231 F.3d at 1223. "The determination of whether
 5 neglect is excusable 'is at bottom an equitable one, taking account of all relevant
 6 circumstances surrounding the party's omission.'" *Lemoge*, 587 F.3d at
 7 1192 (quoting *Pioneer Inv. Servs. Co.*, 507 U.S. at 395).

8
 9 **A. This Court Should Deny The Motion to Vacate Because the Reason For**
 10 **The Delay Factor Favors Defendants**

11 This Court should deny the motion to vacate the order because the Plaintiff nor
 12 its counsel has provided a reason that does not encompass "bare, unadorned
 13 negligence." *Id.* Based on the present facts and the Ninth Circuit precedent previously
 14 relied on by this Court, counsel's negligence does not rise to the level of excusable
 15 negligence. As this court has pointed out in a number of cases, "cases that have
 16 granted relief all involved something more than just failing to note the relevant
 17 deadline. *Id.* at *3(citing *Pioneer Inv. Servs. Co.*, 507 U.S. at 398 (counsel failed to
 18 file timely proof of claim because, contrary to usual practice, notice of the claims-
 19 filing deadline was placed in an inconspicuous area of the notice sent to creditors); *In*
 20 *re Zilog, Inc.*, 450 F.3d 996, 1007(9th Cir. 2006) (same); *Bateman*, 231 F.3d at 1222-
 21 23 (counsel was required to travel to Africa due to a family emergency, and
 22 unsuccessfully sought an extension of time from defendant's counsel to oppose their
 23 motion for summary judgment); *Lemoge*, 587 F.3d at 1197 (counsel failed to timely
 24 serve a complaint in part because he had severe medical complications from a staph
 25 infection that required him to undergo "three surgeries, skin grafts, extensive therapy,
 26 and a full regimen of medications").

27 In the present case, the missed deadline is attributed by counsel for Plaintiff to

1 a paralegal both failing to schedule the proper date (Dkt. No. 115-1, ¶ 2) or scheduling
 2 the wrong Opposition date (Dkt. No. 109, ¶ 4), as well as counsel failing to follow up
 3 on the proper calendaring of the Opposition date due to personal commitments at
 4 home. Dkt. Nos. 109, ¶ 4 and 115-1, ¶ 2. While clearly negligent, counsel's actions
 5 do not arise to the level of excusable neglect because counsel is a member of the Bar
 6 of this Court who is required to be familiar with both the Federal Rules of Civil
 7 Procedure and the Local Rules of this Court. L.R. 83-2.1.2.2(a). The Local Rules are
 8 clear that a party's Opposition to any Motion is due 21 days prior to the hearing, which
 9 in this case was scheduled for March 21, 2016 based on the Motion papers. L.R. 7-9;
 10 Dkt. No. 103. It is inconceivable that Plaintiff's counsel reviewed the Motion when
 11 it came in, but was not cognizant that February 29, 2016 was the date 21 days prior to
 12 the hearing scheduled for March 21, 2016. More telling, is Plaintiff's counsel failure
 13 to either seek a stipulation to extend the time to Oppose from Defendants by two days
 14 or to file an *Ex Parte Application* to extend the time to Oppose upon finding out about
 15 the paralegal's mistake and the missed deadline. McWilliams Decl., ¶ 4. Counsel for
 16 Defendants would have been sympathetic to both the loss of a staff member and to
 17 counsel's personal circumstances. McWilliams Decl., ¶ 5. Plaintiff's counsel did not
 18 seek to explain the missed deadline by Declaration until *after* Defendants pointed out
 19 the failure to meet the deadline in their Reply brief and *never* sought a stipulation with
 20 Defendants. McWilliams Decl., ¶ 6.

21 Counsel's initial declaration stated that his paralegal had "incorrectly
 22 calendared our Opposition date." Dkt. No. 109, ¶ 4. Counsel's declaration submitted
 23 with the present motion states that the paralegal "made a series of mistakes, including
 24 the failure to calendar the deadline to file our Opposition to Defendants' Revised
 25 Motion for Summary Judgment." Dkt. No. 115-1, ¶ 2. The question is which factual
 26 situation is true? Either the date was incorrectly calendared or it was not calendared
 27 at all, but both situations cannot be the true for the same motion and same paralegal.

1 Finally, counsel for Plaintiff still had not filed *any written evidence* in support of the
 2 Opposition, as required by the local rules, until after the Defendants filed their Reply.
 3 McWilliams Decl., ¶ 7. Despite its late filing, the Kouyoumijian Declaration does not
 4 provide a single shred of evidence to support the calculation of a damages amount
 5 based on the alleged breach of contract. McWilliams Decl., ¶ 8. Based on the above
 6 facts, this Court should deny the motion to vacate because the reason for delay weighs
 7 in favor of Defendants.

8 **B. The Court Should Deny the Motion to Vacate Because the Good Faith**
 9 **Factor Weighs in Favor of Defendants**

10 This Court should deny the motion to vacate the order because the good faith
 11 factor weighs in favor of Defendants. While Plaintiff's counsel has sought to explain
 12 the missed deadline, he has done so with two factually inconsistent declarations.
 13 Counsel's initial declaration stated that his paralegal had "incorrectly calendared our
 14 Opposition date." Dkt. No. 109, ¶ 4. Counsel's declaration submitted with the present
 15 motion states that the paralegal "made a series of mistakes, including the failure to
 16 calendar the deadline to file our Opposition to Defendants' Revised Motion for
 17 Summary Judgment." Dkt. No. 115-1, ¶ 2. The question is which factual situation is
 18 true? Either the date was incorrectly calendared or it was not calendared at all, but
 19 both situations cannot be the true for the same motion and same paralegal. The
 20 contradiction between counsel's sworn declarations seem to indicate that the errors
 21 were not made in good faith. *See Sanchez v. Stryker Corp.*, Case No. 2:10-cv-08832-
 22 ODW, 2012 BL 162863, *3 (C.D. Cal. May 02, 2012) (describing the evidence
 23 counsel should have provided to prove good faith). Counsel also does not provide any
 24 justification for why he did not start preparing an Opposition to Defendants' motion
 25 until after the deadline for Opposition had passed. *Id.*; McWilliams Decl., ¶ 9. Based
 26 on the above, neither Plaintiff nor its counsel have presented sufficient evidence to
 27 show that counsel's error was committed in good faith, therefore this Court should

1 deny Plaintiff's motion.

2 **C. This Court Should Deny Plaintiff's Motion Because Plaintiff Has No**
3 **Likelihood of Success on the Underlying Motion**

4 Consideration of the "movant's likelihood of success on the underlying motion
5 is not one of the *Pioneer* factors," but "is an appropriate consideration under the
6 circumstances." *See Medina* at *4 (internal citations omitted). In this case, the
7 relevant Opposition does not factually address or dispute that the only documents
8 produced by Plaintiff in this case, at any time, go to liability for breach of contract,
9 not damages. Dkt. No. 106, ¶ 22. In fact, Plaintiff in its Statement of Genuine
10 Disputes states that it "seeks the opportunity to produce additional evidence to support
11 its claim prior to a trial on the merits." Dkt. No. 106, ¶ 22. Plaintiff has had endless
12 opportunities since *it filed* this case to gather and produce evidence of its alleged
13 damages, whether during the discovery period; during the filing of Plaintiff's response
14 to the initial motion for summary judgment; during the time when the Plaintiff's
15 appeal was pending before the Ninth Circuit; during the time after remand of the case
16 to the district court or during the pendency of the present renewed motion for summary
17 judgment, but still has not produced a single document to support a damages
18 calculation. McWilliams Decl., ¶ 10. Plaintiff also has not produced any evidence
19 that the failure to produce documents at any time was out of its control. Plaintiff's
20 previous counsel was no longer in the case at least as of the remand period and Plaintiff
21 still failed to produce any documents after changing to present counsel. McWilliams
22 Decl., ¶ 11. Based on the above, since Plaintiff has failed to produce any documents
23 supporting a calculation of damages for breach of contract at any time in this litigation,
24 although well within Plaintiff's control, this Court will reach the same conclusion if it
25 considers the underlying motion on its merits, namely that Plaintiff's actions have
26 been untaken in bad faith and lesser sanctions will be insufficient to deter Plaintiff
27 from future misconduct.

D. The Prejudice and Length of Delay Factors Favor Plaintiff

This Court should deny the motion to vacate although the prejudice and length of delay factors favor Plaintiff. As this Court has recently held, “there will be little prejudice to Defendant if Plaintiff is permitted to move forward with her case.... Granting Plaintiff relief will leave the parties in the exact same position as if Plaintiff timely opposed the motion” because since Defendant did not offer a single shred of evidence to dispute any material facts, it still cannot contest Defendants’ Motion. *See Medina v. Wells Fargo Bank, N.A.*, Case No. 2:16-cv-00532-ODW, 2016 BL 162246, *2 (C.D. Cal. May 20, 2016). Additionally, Plaintiff filed its motion for relief two weeks after the Court granted Defendants’ Motion therefore under this Court and Ninth Circuit precedent, this factor also favors Plaintiff. *See Id.*

Although these factors favor Plaintiff, except in the most egregious cases, these factors will almost always favor the Plaintiff, therefore, this Court should still deny the motion to vacate upon balancing the equities as required by the *Pioneer-Briones* standard.

IV. Conclusion

Based on the above, since the reason for the delay and good faith factors tip in favor of Defendants, this Court should deny Plaintiff Toyriffic, LLC’s Motion to Vacate the Court’s Order on Defendant’s Revised Motion for Summary Judgment.

Dated: August 9, 2016

Cotman IP Law Group, PLC

s/Rasheed M. McWilliams

By: _____

Rasheed M. McWilliams

Daniel C. Cotman

Obi Iloputaife

Attorneys for Defendants

*Edvin Karapetian, Edward Minasyan,
and Lena Amerkhanian*

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 35 Hugus Alley, Suite 210, Pasadena, CA 91103. On August 22, 2016, I served the document entitled **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO VACATE THE COURT'S ORDER GRANTING DEFENDANTS' REVISED MOTION FOR SUMMARY JUDGMENT** by placing a true and correct copy thereof enclosed in a sealed envelope addressed to the following interested parties:

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**Attorney for Plaintiff
Toyriffic, LLC**

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed August 22, 2016 at Pasadena, California

s/Stephanie Cruz

STEPHANIE CRUZ